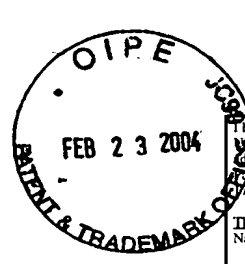


AF/3727



I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Mail Stop Appeal Brief - Patents, Commissioner for Patents, P. O. Box 1450, Alexandria, VA 22313-1450 on February 17, 2004.

Theodore P. Cummings, Esq. 40,973
Name of Attorney Registration No.
Signature of Attorney

P&G Case 8363M

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In the application of :
Mary Carmen Gasco, et al. : Confirmation No. 7279
Serial No. 10/010,818 : Group Art Unit 3727
Filed December 6, 2001 : Examiner S. J. Castellano

For A SHAPED CONTAINER BOTTOM

BRIEF ON APPEALS

Mail Stop Appeal Brief – Patents
Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

Enclosed, pursuant to 37 C.F.R. 1.192(a), is Appellant's brief on Appeal for the above application. The Brief is being forwarded in triplicate.

The fee for this Brief on Appeal is \$330.00 37 CFR 1.17(c).

The Director is hereby authorized to charge the above fee, or any additional fees that may be required, or credit any overpayment to Deposit Account No. 16-2480 in the name of The Procter & Gamble Company. A duplicate copy of this sheet is enclosed.

Respectfully submitted,

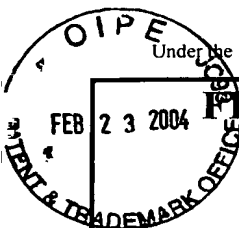
By 

Theodore P. Cummings, Esq.
Attorney or Agent for Applicant(s)
Registration No. 40,973
(513) 634-1906

Date: February 17, 2004

Customer No. 27752

RECEIVED
FEB 27 2004
TECHNOLOGY CENTER R3700

**FEE TRANSMITTAL
for FY 2004**

Patent fees are subject to annual revision.

Complete if Known

Application Number	10/010,818
Confirmation Number	7279
Filing Date	December 6, 2001
First Named Inventor	Mary Carmen Gasco, et al
Examiner Name	S.J. Castellano
Art Unit	3727
Attorney Docket No.	8363M

TOTAL AMOUNT OF PAYMENT (\$)330.00**METHOD OF PAYMENT**

1. ☒ The Director is hereby authorized to charge indicated fees submitted on this form, credit any over payments, and charge any additional fee(s) during the pendency of this application to:

Deposit Account Number: 16-2480

Deposit Account Name: The Procter & Gamble Company

FEE CALCULATION**1. BASIC FILING FEE - Large Entity**

Code (\$)	Fee Description	Fee Paid
1001 770	Utility filing fee	<input type="checkbox"/>
1002 340	Design filing fee	<input type="checkbox"/>
1004 770	Reissue filing fee	<input type="checkbox"/>
1005 160	Provisional filing fee	<input type="checkbox"/>
SUBTOTAL (1)		(\$) <input type="checkbox"/>

2. EXTRA CLAIM FEES FOR UTILITY AND REISSUE - Large Entity

		Extra	Fee from	Fee
		Claims	Below	Paid
Total Claims	<input type="checkbox"/> - 20** =	<input type="checkbox"/> x	<input type="checkbox"/>	= <input type="checkbox"/>
Independent Claims	<input type="checkbox"/> - 3** =	<input type="checkbox"/> x	<input type="checkbox"/>	= <input type="checkbox"/>
Multiple Dependent			<input type="checkbox"/>	= <input type="checkbox"/>

** or number previously paid, if greater; For Reissues, see below

Code (\$)	Fee Description
1202 18	Claims in excess of 20
1201 86	Independent claims in excess of 3
1203 290	Multiple dependent claim, if not paid
1204 86	**Reissue independent claims over original patent
1205 18	**Reissue claims in excess of 20 & over original patent

SUBTOTAL (2) (\$)☐**FEE CALCULATION (continued)****3. ADDITIONAL FEES**

Code (\$)	Fee Description	Fee Paid
1051 130	Surcharge-late filing fee or oath	<input type="checkbox"/>
1052 50	Surcharge-late provisional filing fee or cover sheet	<input type="checkbox"/>
1053 130	Non-English specification	<input type="checkbox"/>
1812 2,520	For filing a request for <i>ex parte</i> reexamination	<input type="checkbox"/>
1804 920*	Requesting publication of SIR prior to Examiner's action	<input type="checkbox"/>
1805 1,840*	Requesting publication of SIR after Examiner's action	<input type="checkbox"/>
1251 110	Extension for reply within 1 st month	<input type="checkbox"/>
1252 420	Extension for reply within 2 nd month	<input type="checkbox"/>
1253 950	Extension for reply within 3 rd month	<input type="checkbox"/>
1254 1,480	Extension for reply within 4 th month	<input type="checkbox"/>
1255 2,010	Extension for reply within 5 th month	<input type="checkbox"/>
1401 330	Notice of Appeal	<input type="checkbox"/>
1402 330	Filing a brief in support of an appeal	<input checked="" type="checkbox"/>
1403 290	Request for oral hearing	<input type="checkbox"/>
1451 1,510	Petition to institute a public use proceeding	<input type="checkbox"/>
1452 110	Petition to revive - unavoidable	<input type="checkbox"/>
1453 1,330	Petition to revive - unintentional	<input type="checkbox"/>
1501 1,330	Utility issue fee (or reissue)	<input type="checkbox"/>
1502 480	Design issue fee	<input type="checkbox"/>
1460 130	Petitions to the Commissioner	<input type="checkbox"/>
1807 50	Processing fee under 37 C.F.R. 1.17(q)	<input type="checkbox"/>
1806 180	Submission of Information Disclosure Statement	<input type="checkbox"/>
1809 770	Filing a submission after final rejection (37 CFR § 1.129(a))	<input type="checkbox"/>
1810 770	For each additional invention to be examined (37 CFR § 1.129(b))	<input type="checkbox"/>
1801 770	Request for Continued Examination	<input type="checkbox"/>
1802 900	Request for expedited examination of a design application	<input type="checkbox"/>
1454 1330	Acceptance of unintentionally delayed claim for priority under 35 U.S.C. 119, 120, 121, or 365 (a) or (c)	<input type="checkbox"/>
Other fee (specify) _____		<input type="checkbox"/>
Other fee (specify) _____		<input type="checkbox"/>

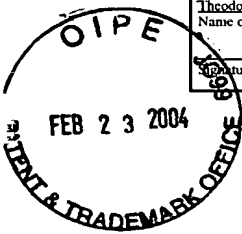
* Reduced by Basic Filing Fee Paid **SUBTOTAL(3) (\$)** [330]**SUBMITTED BY**

Name (Print/Type)	Theodore P. Cummings	Registration No. (Attorney/Agent)	40,973	Complete (if applicable)
Signature				Telephone (513) 634-1906
				Date 2/17/2004

This collection of information is required by 37 CFR 1.17. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.14. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon individual case. Any comments on the amount of time you are required to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P. O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

I hereby certify that this correspondence is being deposited in the United States Postal Service as first class mail in an envelope addressed to: Mail Stop Appeal Brief - Patents, Commissioner for Patents, P. O. Box 1450, Alexandria, VA 22313-1450 on February 17, 2004.

Theodore P. Cummings, Esq. 40,973
Name of Attorney Registration No.
Signature of Attorney



Edwin
3-104
24
APPEAL
BRIEF
8363M

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application No.: 10/010,818
Appellant(s): MARY CARMEN GASCO, ET AL.
Filed: December 6, 2001
Title: A SHAPED CONTAINER BOTTOM

TC/A.U.: 3727
Examiner: S. J. Castellano
Conf. No.: 7279
Docket No.: 8363M

APPEAL BRIEF

Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450

Dear Sir,

This Appeal Brief is submitted in support of the Notice of Appeal filed on January 8, 2004 setting a two-month period for response.

REAL PARTY IN INTEREST

The real party in interest is The Procter & Gamble Company of Cincinnati, Ohio. The Inventors who are Mary Carmen Gasco, Shane Edwin Meeker, Ronald Peter DeVlam, Mark William Rakentine, Pat Lee O'Brien, Jean-Marc Henri Kirouac, and Janet Adele Veith assigned their interest to The Procter & Gamble Company which was recorded on August 19, 2002, reel 013505, frame 0407.

RELATED APPEALS AND INTERFERENCES

There are no related appeals or interferences known to the Appellants, or known to Appellants' legal representative that will directly affect, be directly affected by, or that will have a bearing on the Board's decision in the present appeal.

STATUS OF CLAIMS

Claims 1 and 3-20 are pending and stand rejected. A copy of these claims, which are being appealed, appear in Appendix I herein.

02/25/2004 CNGUYEN 00000100 162480 10010818
01 FC:1402 330.00 DA

RECEIVED
FEB 27 2004
TECHNOLOGY CENTER R3700

STATUS OF AMENDMENTS

An amendment dated January 7, 2004 was submitted by Appellants subsequent to the Final Official Action. The amendment was not accepted by the Examiner. The amendment attempted to address the Examiner's objections to the drawings by submitting a new set of drawings.

SUMMARY OF THE INVENTION

In one aspect, the invention relates to a shaped container bottom for containing a plurality of curved snack pieces, each snack piece having a peripheral edge and a lower surface, within a container, the container bottom comprising a bottom panel having a concave-curvature about a first axis of the bottom panel, wherein the concave-curvature of the bottom panel substantially conforms to the curvature of the snack pieces and at least a portion of the peripheral edge of a lowest snack piece of the plurality of snack pieces rests upon the bottom panel. (Appellants' Specification, page 2, lines 14-19).

In another aspect, the invention relates to a shaped container bottom for containing a plurality of curved snack pieces, each snack piece having a peripheral edge and a lower surface, within a container, the container bottom comprising a bottom panel comprising at least two base portions and a bottom panel center disposed between the base portions, the bottom panel center having a concave curvature about a first axis of the container, wherein the concave-curvature of the bottom panel substantially conforms to the curvature of the snack pieces and a peripheral edge of a lowest snack piece of the plurality rests upon the flat portions. (Appellants' Specification, page 2, lines 20-26).

In yet another aspect, the invention relates to a process for filling a container with curved snack pieces, the process comprising providing a container having a shaped bottom that conforms to the shape of the snack pieces and introducing the snack pieces into the container such that the pieces self align because of the shape of the container bottom. (Appellants' Specification, page 2, lines 27-30).

ISSUES

Appellants present the following issue for consideration on appeal:

- I. Whether the rejection of Claims 1 and 3-20 under 35 U.S.C. § 102(b) as being anticipated by Johnson (U.S. Patent No. 4,164,588) is proper?
- II. Whether the rejection of Claims 1 and 3-20 under 35 U.S.C. § 102(b) as being anticipated by Baur, et al. (U.S. Patent No. 3,498,798) is proper?
- III. Whether the rejection of Claims 1 and 3-20 under 35 U.S.C. § 102(b) as being anticipated by Griffith (U.S. Patent No. 4,011,347) is proper?

- IV. Whether the rejection of Claims 1, 3-7 and 10-20 under 35 U.S.C. § 102(e) as being anticipated by Sagan (U.S. Patent No. 6,042,856) is proper?
- V. Whether the rejection of Claims 1, 3 and 4 under 35 U.S.C. § 102(b) as being anticipated by Ruiz (U.S. Patent No. 4,873,099) is proper?
- VI. Whether the rejection of Claims 1, 3, 4, 6-10 and 19 under 35 U.S.C. § 102(b) as being anticipated by a stack of three or more PRINGLES® potato crisps is proper?
- VII. Whether the rejections of Claims 6-9 and 18 under 35 U.S.C. § 103(a) as being unpatentable over Johnson (U.S. Patent No. 4,164,588), Griffith (U.S. Patent No. 4,011,347) and Baur, et al. (U.S. Patent No. 3,498,798) are proper?
- VIII. Whether the rejections of Claims 8 and 9 under 35 U.S.C. § 103(a) as being unpatentable over Sagan (U.S. Patent No. 6,042,856) is proper?

GROUPING OF CLAIMS

Claims 1 and 3-20 stand or fall together.

ARGUMENTS

- I. **Whether the rejection of Claims 1 and 3-20 under 35 U.S.C. § 102(b) as being anticipated by Johnson (U.S. Patent No. 4,164,588) is proper?**

At present, Claims 1 and 3-20 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Johnson (U.S. Patent No. 4,164,588--hereafter, "Johnson '588"). The Examiner asserts that Johnson '588 discloses a package liner that defines a shaped container bottom for containing a plurality of curved snack pieces within the container. The Examiner further asserts that the container bottom of the container comprises a concave curvature about a first axis wherein the concave curvature of the bottom panel substantially conforms to the curvature of the snack pieces. The Examiner also asserts that the bottom panel of the liner is integral to the container.

A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference.¹ The identical invention must be shown in as complete detail as is contained in the claim.² The elements must be arranged as required by the claim.³

Appellants do not agree that Johnson '588 provides a proper anticipatory reference under 35 U.S.C. § 102(b). First, Johnson '588 teaches a mere "liner".⁴ According to Johnson '588, the

¹ Verdegaal Bros. V. Union Oil Co. of California, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987).

² Richardson v. Suzuki Motor Co., 868 F. 2d 1226, 1236, 9 USPQ2d 1913, 1920 (Fed. Cir. 1989).

³ In re Bond, 910 F.2d 831, 15 USPQ2d 1566 (Fed. Cir. 1990).

⁴ Johnson (U.S. Patent No. 4,164,588: col. 1, lines 1-2; Title: Package Liner and Fragile Snack Chip Combination).

package liner is placed within a package, and is not itself the package.⁵ That means that Johnson's package liner is not an integrated portion of the package nor is it a structural component thereof. By definition, that which is an "integral" portion of some greater structure has been formed, blended or united into a functioning or unified whole.⁶

Dictionaries, encyclopedias and treatises, publicly available at the time the patent is issued, are objective resources that serve as reliable sources of information on the established meanings that would have been attributed to the terms of the claims by those of skill in the art. Such references are unbiased reflections of common understanding not influenced by expert testimony or events subsequent to the fixing of the intrinsic record by the grant of the patent, not colored by the motives of the parties, and not inspired by litigation.⁷

Also, the Examiner, in the office action dated April 18, 2003, acknowledges that Johnson provides a package liner which Johnson '588 readily concedes is a non-attached member placed within a package.⁸ (See also footnote no. 5 supra). By this admission, the Examiner therefore acknowledges that the package liner of Johnson '588 is not an integrated structural component of the package. Therefore, this element in Appellants' Claim 1 is completely missing from Johnson '588.

Appellants assert that Johnson '588 fails to disclose Appellants' integrated shaped container bottom wherein the container bottom is itself an integral part of the container. Furthermore, Johnson's '588 liner, since it is an insert and not itself an integral part of the container, does not teach Appellants' container bottom having a concave-curvature.

Appellants therefore respectfully request reconsideration and allowance of Claims 1 and 3-20 over the Examiner's 35 U.S.C. § 102(b) rejection as being anticipated by Johnson '588.

II. Whether the rejection of Claims 1 and 3-20 under 35 U.S.C. § 102(b) as being anticipated by Baur, et al. (U.S. Patent No. 3,498,798) is proper?

Claims 1 and 3-20 are rejected under 35 U.S.C. § 102(b) as being anticipated by Baur, et al. (U.S. Patent No. 3,498,798--hereafter, "Baur '798"). The Examiner asserts that Baur '798 discloses a package that defines a shaped container bottom for containing a plurality of curved snack pieces. The Examiner further asserts that the container bottom comprises a bottom panel that has a concave curvature wherein the concave curvature substantially conforms to the curvature of the snack pieces and at least a portion of the peripheral edge of the lowest snack piece of the plurality of snack pieces rests upon the base portions of the bottom panel.

⁵ Id. at col. 4, lines 51-54: "In use, the loaded package liner 10 can be placed in a can, a bag, a pouch or any other enveloping package which is appropriate to the type of article packaged therein."

⁶ Merriam Webster's Collegiate Dictionary (Tenth Edition), page 608.

⁷ Texas Digital Systems, Inc. v. Telegenix, Inc., 308 F.3d 1193, 1202-1203 (Fed. Cir. 2002).

⁸ Examiner's Office Action dated April 18, 2003, page 4, line 2.

Baur '798 does not teach or provide a shaped container bottom. The Examiner's contentions notwithstanding, Baur '798 neither teaches in their specification nor discloses in their figures a shaped container bottom of any sort nor one like Appellants'. Net, this key element is completely missing from Baur '798.

What the Examiner seems to be referencing are the snack chips shown in Figure 1 of Baur '798. However, the bottom snack piece is not shown to be resting on a shaped container bottom, nor does Baur '798, anywhere within its disclosure, teach or disclose that its container bottom is shaped. In fact, at column 3, lines 56-58, Baur '798 states the following: "Although only top member 13 is shown, the seal and method shown and described are also applicable to bottom member 12." [Emphasis added.]

Thus, the bottom member 12 (which the Examiner asserts as being shaped) is not shown in any diagram of Baur '798. Add to that that the bottom of Baur '798 is not taught in its disclosure to be shaped or curved. Also, one of skill in the art would take the description of the bottom member of Baur '798 to be flat just like the top member 13 which is in fact flat and un-shaped.

To conclude, Appellants point out that the Examiner, in his rejection, points to no teaching or figure within Baur '798 to properly validate the rejection.

Therefore, Appellants' respectfully contend that Baur '798 should be removed as an anticipatory reference against Appellants' claims and that Claims 1 and 3-20 should be allowed over the Examiner's 35 U.S.C. § 102(b) rejection as applied to Baur '798.

III. Whether the rejection of Claims 1 and 3-20 under 35 U.S.C. § 102(b) as being anticipated by Griffith (U.S. Patent No. 4,011,347) is proper?

Claims 1 and 3-20 are rejected under 35 U.S.C. § 102(b) as being anticipated by Griffith (U.S. Patent No. 4,011,347--hereafter, "Griffith '347"). The Examiner asserts that Griffith '347 discloses a package defining a shaped container bottom for containing a plurality of curved snack pieces, the shaped container bottom having a bottom panel that has a concave curvature about a first axis of the container. The Examiner further asserts that the concave curvature of the bottom panel substantially conforms to the curvature of the snack pieces and a least a portion of the peripheral edge of a lowest snack piece of the plurality of snack pieces rests upon the base portions of the bottom panel.

Griffith '347 does not disclose Appellants' invention. In Claim 1, Appellants claim a shaped container bottom having a concave curvature to the container bottom.⁹ This concave curvature is definitively shown in Appellants' Figure 9 in which the container bottom curves upwardly into the container. In stark contrast to Appellants' invention, Griffith '347 provides a container bottom that curves downwardly away from the container thereby forming a convex curvature in their container bottom. Furthermore, Griffith '347 does not teach any other configuration for its shaped container

⁹ Appellants' Specification, page 11, lines 1-6.

bottom either in its specification or in its figures. Clearly, by providing an oppositely oriented shaped container bottom, Griffith's snack pieces are meant to be oriented differently than Appellants' orientation of their snack pieces.

This convex curvature of Griffith's is readily seen in Figures 1, 2, 3, and 3A of Griffith '347. Apparently, Griffith '347 is missing the element of Appellants' shaped container bottom having a concave curvature.

Since this key element is missing in Griffith '347, Appellants respectfully request reconsideration and allowance of Claims 1 and 3-20 over the Examiner's 35 U.S.C. § 102(b) rejection as applied to Griffith '347.

IV. Whether the rejection of Claims 1, 3-7 and 10-20 under 35 U.S.C. § 102(e) as being anticipated by Sagan (U.S. Patent No. 6,042,856) is proper?

Claims 1 and 3-7 and 10-20 stand rejected under 35 U.S.C. § 102(e) as being anticipated by Sagan (U.S. Patent No. 6,042,856--hereafter, "Sagan '856"). The Examiner states that Sagan '856 discloses a package defining a shaped container bottom for containing a plurality of curved snack pieces, in this case shrimp organized in a circular array about a tray configured to hold shrimp. The Examiner asserts that the package comprises a bottom panel having concave curvature such bottom panel substantially conforming to the curvature of the shrimp.

Sagan provides a tray that provides for the presentation of shrimp in a circular array. Sagan's tray misses several elements of Appellants' shaped container bottom. First, Sagan '865 does not provide a container whose concave-curvature bottom panel substantially conforms to the curvature of a snack piece having a peripheral edge. Sagan '865 only teaches shrimp, which do not have peripheral edges, and which are not snack chips. To clarify, shrimp do not have peripheral edges or any edges for that matter, but rather are in parts bulbous, circular and/or cylindrical in their construction. Further, Sagan '865 does not stack their shrimp like Appellants' snack chips. Rather, Sagan '865 presents shrimp in a circular array.¹⁰ Appellants therefore respectfully disagree with the Examiner's contentions that Sagan '865 discloses Appellants' invention.

Without these elements, Sagan '856 cannot be properly said to provide a basis for a 35 U.S.C. § 102(b) rejection. Appellants therefore respectfully request reconsideration and allowance of Claims 1, 3-7 and 10-20 over the Examiner's 35 U.S.C. § 102(e) rejection.

V. Whether the rejection of Claims 1, 3 and 4 under 35 U.S.C. § 102(b) as being anticipated by Ruiz (U.S. Patent No. 4,873,099) is proper?

Claims 1, 3 and 4 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Ruiz (U.S. Patent No. 4,873,099--hereafter, "Ruiz '099"). The Examiner states that Ruiz '099 discloses an edible

¹⁰ Sagan (U.S. Patent No. 6,042,856): Fig. 1.

shell or bowl defining a shaped container bottom, a plurality of bowls being packaged in a stacked array wherein the lowest positioned edible bowl defines the shaped bottom of all the other stacked edible bowls.

With regard to Ruiz '099, Appellants' invention comprises a shaped container bottom formed thusly to receive a plurality of curved snack pieces. The bottom panel of the container has a concave-curvature that substantially conforms to the curvature of the snack pieces. Furthermore, at least a portion of the peripheral edge of the lowest snack piece rests upon Appellants' bottom panel.

Ruiz '099 does not provide a package but merely shaped snack pieces that may be stacked into one-another. Ruiz '099 does show a package into which Ruiz' edible bowls may be stacked having a container bottom that is completely planar (i.e., flat) and non-curved in any respect which is evident in Figures 5 and 6. Also, no part of the peripheral edge of the lowest edible product in Ruiz '099 touches or makes contact with the bottom panel of Ruiz's container.

Since those elements are missing, Appellants respectfully request reconsideration and allowance of Claims 1, 3-4 over the Examiner's 35 U.S.C. § 102(b) rejection under Ruiz '099.

VI. Whether Claims 1, 3, 4, 6-10 and 19 under 35 U.S.C. § 102(b) as being anticipated by a stack of three or more PRINGLES® potato crisps is proper?

Claims 1, 3, 4, 6-10 and 19 stand rejected under 35 U.S.C. § 102(b) as being anticipated by a stack of three or more PRINGLES® potato crisps as disclosed in Applicants' specification. The Examiner states that in a stack of PRINGLES®, the bottom most crisp defines a shaped container bottom while the other stacked crisps rest thereon.

A stack of PRINGLES® potato crisps, in and of themselves, do not teach or provide a container having a curved, concave container bottom for stacking said crisps. Without the curved container bottom to stack the crisps, which Appellants claim and show, a key element to establishing a proper rejection under 35 U.S.C. § 102(b) is missing. Appellants respectfully assert that the Examiner has not made a proper rejection based on anticipation and therefore request reconsideration and allowance of Claims 1-4, 6-10 and 19 over the Examiner's 35 U.S.C. § 102(b) rejection.

VII. Whether the rejections of Claims 6-9 and 18 under 35 U.S.C. § 103(a) as being unpatentable over Johnson (U.S. Patent No. 4,164,588), Griffith (U.S. Patent No. 4,011,347) and Baur, et al. (U.S. Patent No. 3,498,798) are proper?

Claims 6-9 and 18 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Johnson '588, Griffith '347, and Baur '798. The Examiner states that each reference discloses the invention individually except for the dimensions recited. By stating such, the Examiner seems to be rejecting Appellants' Claims 6-9 and 18 as to each of the noted references above individually and not by combining the references together against Appellants' claims—i.e., not Johnson '588 in view of

Griffith '347 and further in view of Baur '798. The Examiner asserts that the dimensions recited represent values close to what one having ordinary skill in the art would expect for a snack food container, that such values are thus well known and that there has been no criticality associated with the dimensions outlined in the specification. The Examiner further asserts that it would have been obvious to modify the dimensions of the snack pieces to conform to the container bottom.

To establish a prima facie case of obviousness, all the claim limitations must be taught or suggested by the prior art.¹¹ Obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art.¹²

Appellants respectfully disagree with the Examiner's contentions. First, Johnson '588 fails to teach or suggest a concave curved, shaped container bottom wherein the shaped container bottom is integrally affixed to the container itself. Rather, Johnson '588 merely provides an insert that is placed within a container.

Nothing in Johnson '588 teaches or suggests integrating the insert with a container thereby making the insert a fixed component with the container. In fact, Appellants assert that because Johnson '588 only teaches a paper liner, to attempt to integrate the liner into a package (e.g., Appellants' polyethylene package) in any sort of fixed, integrated state would destroy the liner and render it useless to its intended purpose. Given these omissions by Johnson '588, Appellants respectfully assert that the Examiner's rejection based on obviousness has not been met. Therefore, Appellants respectfully request reconsideration and allowance of Claims 6-9 and 18 over 35 U.S.C. § 103(a) in view of Johnson '588.

As noted above, Baur '798 does not teach or disclose a shaped container bottom whose bottom panel has a concave curvature about an axis. Baur '798 merely provides a tubular package for storing snack pieces. Without some suggestion or teaching of Appellants' shaped container bottom, it is improper to apply Baur '798 against Appellants' invention in an obviousness rejection. Therefore, Appellants respectfully request reconsideration and allowance of Claims 6-9 and 18 over the 35 U.S.C. § 103(a) rejection.

VIII. Whether the rejections of Claims 8 and 9 under 35 U.S.C. § 103(a) as being unpatentable over Sagan (U.S. Patent No. 6,042,856) is proper?

Claims 8 and 9 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Sagan '856. The Examiner states that Sagan '856 discloses the invention except for the center radius

¹¹ In re Royka, 490 F.2d 981, 180 USPQ 580 (CCPA 1974).

¹² In re Fine, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988); In re Jones, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992).

dimensions. The Examiner further states that it would have been obvious by design choice to reduce the scale (make the invention smaller) in order to accommodate smaller shrimp and reduced amount of dipping sauce required for smaller shrimp so that the size of the center radius is less than 60 mm and between 15 to 35 mm.

The Examiner states that Sagan '865 discloses the invention except for the center radius dimensions. The Examiner further states that it would have been obvious by design choice to reduce the scale (make invention smaller) in order to accommodate smaller shrimp and reduced amount of dipping sauce required for smaller shrimp so that the size [of] the center radius is less than 60 mm and between 15 to 35 mm.

Appellants respectfully assert that the Examiner, using Sagan '865, has not provided a prima facie case of obviousness. First, Sagan '865 presents shrimp, not curved snack pieces. Nor does Sagan '865 teach or suggest Appellants' curved snack pieces. Further, Sagan '865 does not teach or suggest the stacking, one upon the other, of Appellants' curved snack pieces. Instead, Sagan '865 presents shrimp in a circular array and not in the stacked condition of Appellants' curved snack pieces.¹³ Appellants therefore respectfully disagree with the Examiner's contentions that Sagan '865 discloses Appellants' invention.

Sagan '865 neither teaches or discloses the elements of Appellants' invention and without such teaching or disclosure, the Examiner's obviousness rejection cannot properly stand. Therefore, Appellants respectfully request reconsideration and allowance of Claims 8 and 9 over 35 U.S.C. § 103 in view of Sagan '865.

¹³ Sagan (U.S. Patent No. 6,042,856): Fig. 1.

SUMMARY

For the reasons set forth above, Appellants submit that the Examiner has not set forth the proper evidence for either of the 35 U.S.C. § 102(b) or §103(a) rejections. Accordingly, reversal of the Examiner's findings of unpatentability is respectfully requested.

FOR: MARY CARMEN GASCO, ET AL.

By 

Theodore P. Cummings
Attorney for Appellants
Registration No. 40,973
(513) 634-1906

February 17, 2004
Customer No. 27752

APPENDIX I

Appealed Claims: Application No. 10/010,818

1. A shaped container bottom integral to a container for containing a plurality of curved snack pieces, each snack piece having a center radius, a center height, a saddle height, a peripheral edge and a lower surface, within a container, the container bottom comprising a bottom panel having a center radius, a center height, and a concave-curvature about a first axis of the bottom panel, wherein the concave-curvature of the bottom panel substantially conforms to the curvature of the snack pieces and at least a portion of the peripheral edge of a lowest snack piece of the plurality of snack pieces rests upon the bottom panel.
3. The container bottom according to claim 1, wherein the concave-curvature is downwardly curved about the first axis.
4. The container bottom according to claim 3, wherein the first axis is a major axis of the bottom panel.
5. The container bottom according to claim 3, wherein the curvature of the bottom panel conforms to the curvature of the plurality of snack pieces whereby the peripheral edge of the lowest snack piece substantially rests upon the bottom panel.
6. The container bottom according to claim 1, wherein the saddle height of the snack piece is from about 0.5 mm to about 30 mm greater than the center height of the bottom panel.
7. The container bottom according to claim 6, wherein the center height of the bottom panel is from about 2 mm to about 40 mm.
8. The container bottom according to claim 6, wherein the center radius of the bottom panel is not more than about 60 mm.
9. The container bottom according to claim 8, wherein the center radius of the bottom panel is from about 15 mm to about 35 mm.
10. The container bottom according to claim 1, wherein the bottom panel has a second upwardly concave-curvature about a second axis of the bottom panel.
11. A shaped container bottom for containing a plurality of curved snack pieces, each snack piece having a saddle height, a peripheral edge and a lower surface, within a container, the container bottom comprising a bottom panel comprising at least two base portions and a bottom panel center disposed between the base portions, the bottom panel center having a center height and a concave curvature about a first axis of the container, wherein the concave-

curvature of the bottom panel substantially conforms to the curvature of the snack pieces and a peripheral edge of a lowest snack piece of the plurality rests upon the base portions.

12. The container bottom according to claim 11, wherein the concave-curvature is downwardly curved about the first axis.
13. The container bottom according to claim 11, wherein the bottom panel has a second upwardly concave-curvature about a second axis of the bottom panel.
14. The container bottom according to claim 13, wherein the first axis is a major axis of the bottom panel.
15. The container bottom according to claim 11, wherein the bottom comprises two base portions each base portion being substantially flat and having a width greater than 0 mm.
16. The container bottom according to claim 11, wherein the curvature of the bottom panel center conforms to the curvature of the plurality of snack pieces whereby the peripheral edge of the lowest snack piece substantially rests upon the bottom panel center.
17. The container bottom according to claim 11, wherein the container bottom is thermoformed.
18. The container bottom according to claim 11, wherein the saddle height of the snack piece is from about 0.5 mm to about 30 mm greater than the center height of the bottom panel.
19. A container comprising the container bottom of claim 1.
20. A container comprising the container bottom of claim 11.